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Joint Return Liability and Poe v. Seaborn: Should Both Be Repealed.

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JOINT RETURN LIABILITY AND POE V. SEABORN SHOULD BOTH BE REPEALED

by Richard C.E. Beck

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In this article, the author points out that the joint tax liability arising from joint returns burdens wives far more often than husbands, and is discriminatory against women. He argues that joint liability was unjustified when originally enacted, and is even less justifiable today. He notes that other countries do not impose joint liability on spouses, even where income-splitting is allowed. He also criticizes the relief offered by the innocent spouse provisions contained in section 6013(e). Among other problems, the standards of "innocence" and "equity" are vague and uncertain, leading to inconsistent decisions. He argues that section 6013(e) cannot be repaired, because the "innocence" requirement is misconceived.

Repeal of joint return liability would result in no abuse potential, because transferee liability under current law already provides adequate protection to the fisc. He considers transferee liability in the context of alimony, child support, and property settlement agreements.

The author also argues that the doctrine of Poe v. Seaborn imposes a similarly unfair liability upon women in the community property states. He points out that in such states, wives have no control over the income earned by their husbands, and thus are effectively in the same position as in the common law states. Again, he compares foreign law, including the countries from which our community property law derives, and observes that our rules are uniquely unfair. He argues that section 66 does not and cannot offer adequate relief, and recommends that Congress simply repeal the rule of Poe v. Seaborn together with joint return liability.

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I. INTRODUCTION

Under present law, 99 percent of married taxpayers become liable for their spouses' federal income taxes solely because they file joint returns. In the community property states, each spouse is liable for the tax on one-half of the other spouse's earned income, even filing separately, under *Poe v. Seaborn*, 282 U.S. 101 (1930). Both rules should be repealed.

Women are by far the most frequent victims of both forms of liability.[1] Women are routinely forced to pay

[1]The statute itself is gender-neutral, but it appears that the vast majority of collections from the "wrong" (or non-earning) spouse are from women. The figure would be over 90 percent if the litigated innocent spouse cases reflect the general percentage of all collections. For details of this and many other issues discussed below, *see* Beck, "The Innocent Spouse Problem: Joint and Several Liability Should Be Repealed," 43(2) *Vand.L.Rev.* 317 (1990), from which much of this report is digested.

their husbands' (and even ex-husbands') income taxes in thousands of cases each year.[2] All such collections are unfair, and some threaten or inflict financial ruin upon women solely because they signed a joint return, or resided in a community property state while married to someone who failed to pay his taxes.

In recognition of the sometimes extraordinarily harsh effects of joint liability, Congress enacted relief rules under Sections 6013(e) and 66 for the "innocent spouse." Unfortunately, the relief rules are both narrowly restrictive and highly ambiguous. They fail to protect the vast majority of taxpayers. The decisional law under Section 6013(e) is enormous, but confused and inconsistent. There is no principled way to repair the relief rules because there is no justification for excluding anyone from relief.

Joint liability is contrary to the cardinal principle that tax liability should be measured by ability to pay. It is rooted in long outdated assumptions of the economic unity and permanence of marriage. Rules holding spouses liable for each other's taxes are an anachronism, and have been repealed, or severely limited, in all other developed countries where they ever existed. They should be repealed in the United States as well.

II. JOINT RETURNS

Section 6013(d) requires joint and several liability of the spouses if they elect to file jointly. Approximately 99 percent of married taxpayers file jointly each year, because filing separately usually results in a higher tax. The incentive is all but irresistible, and joint filing has aptly been called "mandatory in fact." Thus virtually all married taxpayers are subject to joint return liability.

This liability is aberrational when compared to tax systems in other countries,[3] even those which also provide valuable tax benefits to married persons filing jointly.[4] No other OECD country taxes wives for their husbands' income as a general rule, much less women who are separated or divorced.[5] Under U.S. law, by contrast, thousands of separated and divorced women each year are taxed for no other reason than that they were married at the time their ex-husbands earned income.

The rule of joint return liability was first enacted in 1938. Until then, filing jointly (which had been allowed since 1918) did not entail joint and separate liability of the spouses, despite the government's insistence to the contrary. See *Cole v. Comm'r*, 81 F.2d 485 (CA-9, 1935), *rev'g* 29 B.T.A. 602 (1933).

In *Cole*, the Ninth Circuit held that a taxpayer's cardinal right to be taxed only on his own income was unchanged by joint filing, and rejected the government's argument that administrative necessity requires joint and several liability, at least where the respective separate incomes of the spouses are ascertainable. The government argued that because joint returns do not explicitly set forth the respective separate incomes and deductions of the spouses, it would be unable to determine the separate amounts for which each spouse should be liable.

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This purported "administrative necessity" was the only reason put forth in the committee reports when Congress overruled *Cole* by enacting the predecessor of Section 6013(d) in 1938. Yet the argument is palpably insufficient. There is ordinarily no difficulty in determining each spouse's net income on a joint return. The audit process almost necessarily reveals the source of any asserted deficiency.[6] Moreover, such determinations are in fact sometimes required under current law in order to limit the amount of each spouse's separate losses which may be carried forward or back to offset his or her share of income in a joint return year, and in order to calculate the amount of each spouse's separate right to a refund from a joint return.[7] The method used is to calculate each spouse's separate net income as if he or she had filed separately. There are adequate rules under current law

[2]The IRS keeps no statistics on the number of instances of collection from the wrong spouse, nor of the amounts involved. It appears that such collections are frequent and widespread, however, and may be on the order of some tens of thousands of instances annually.

[3]For example, no marital liability for income taxes is imposed in any form in Canada, Australia, Japan, Italy, Spain, Sweden, or the United Kingdom.

[4]*Cf.* Germany, which provides for income-splitting computed as under U.S. law, but without joint and several liability, and Belgium, which has a still more generous system of income-splitting.

[5]In France, joint liability is imposed in principle, but wives who are no longer living with their husbands at the time of enforcement proceedings are nearly always excused. Also, unlike U.S. law, in France the tax authorities must exhaust all possibilities of collecting from the husband before turning to the wife.

In the U.K., husbands were formerly liable for tax on their wives' income, but wives were never liable for their husbands' taxes. This system was abolished in 1990 in favor of completely separate liability for both spouses.

[6]There was no such difficulty in the *Cole* litigation either; the Bureau of Internal Revenue had simply assessed the husband by mistake, and negligently let the statute of limitations run as to the wife. In case of doubt, the IRS can always assess both spouses, and let the taxpayers prove the sources of their income, as the *Cole* court pointed out.

[7]*See* Rev. Ruls. 80-6,7,8; 1980-1 C.B. 296 ("separate tax method of allocation" applied to refunds; and for losses see Rev. Rul. 60-216, 1960-1 C.B. 126; Rev. Rul. 65-140, 1965-1 C.B. 127; and Rev. Rul. 75-368, 1975-2 C.B. 480).

Similar rules were in effect at the time of the *Cole* litigation, as well as other regulations (later invalidated) which required the same determination of the separate net incomes of the spouses for the purpose of limiting each spouse's charitable contributions and capital losses on joint returns. The Treasury has apparently never experienced any difficulty administering these rules. They all worked to the Treasury's advantage, however. The government's litigating position in *Cole* was thus at best uninformed, and was possibly in bad faith.

for apportioning personal deductions and dependent exemptions for this purpose.[8]

Adequate reasons for imposing joint and several liability have never been provided. There is no evidence that couples ordinarily share all their property to such an extent that they should be presumed indifferent to the incidence of tax liability. And even if such sharing were the norm, it could not justify joint liability after termination of the economic unity of the family by divorce.[9]

Joint returns were introduced in 1918... without any thought of special rates or privileges for married persons.

Contrary to widely held belief, joint return liability was not enacted as the "price one must pay" for lower tax rates on joint returns. The favorable tax rates for joint returns computed by income-splitting were not introduced until 1948, some 10 years after enactment of joint return liability.[10] Moreover, the right of spouses to offset deductions and losses against each other's income and gains had been available to taxpayers from 1918 until 1938 without the "price" of joint and several liability. Joint returns were introduced in 1918, apparently for the sole purpose of convenience both for taxpayers and for the government, without any thought of special rates or privileges for married persons.

The *quid pro quo* justification for joint return liability is as weak logically as it is historically. The tax advantage of joint filing is quite modest (except in rare cases). But even this "advantage" exists only when compared with the punitive rates applicable to married persons filing separately.[11]

Even admitting that joint returns provide valuable tax benefits under the current rules, the size of the benefits bears no relation to the joint return liability assumed, which may be unlimited in amount. The benefit explanation cannot justify joint liability for an amount greater than the tax saving from filing jointly.

Finally, the "benefits" usually inure to the husband, while the liability almost always is borne by the wife. Joint return liablity is not only unfair in principle, it is highly discriminatory against women in fact.[12]

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A. Innocent Spouse Rules

Congress enacted the "innocent spouse" rules under Section 6013(e) in 1971 in order to mitigate the harsh effects of joint return liability. Under these rules, a wife may be relieved of liability for tax items of the husband

[8]Over 800,000 separate returns are filed each year by married persons, with no apparent difficulty. On the other hand, it is not clear how many of these involve couples who are still living together and whose personal finances are commingled.

The current rules are as follows. Business income and deductions are allocated to the owner(s) of the business. Investment income from community property and jointly owned property is divided equally between the spouses, even if one spouse actually receives all the income. Items of personal deduction (such as medical expenses) which are paid out of community or jointly owned funds are ordinarily divided equally between the spouses, but items paid out of separately owned property are normally deductible only by the payor spouse, even if the payment is for a joint obligation. (The limitations as to such items, such as the 7.5-percent floor on medical expenses, are separately applied to each spouse.) Even when payments are made out of a joint account or a separate account of the other spouse, however, if the taxpayer can prove that the funds used were his own he will be entitled to the entire deduction. If the source of the funds cannot be traced, one-half of the deduction is allowed to each spouse.

For certain items, such as interest and taxes, it is necessary in addition that the payor be liable for the obligation. Thus if the husband makes payments of interest and taxes on a house owned by the wife, he will not be allowed the deductions (unless the payments qualify as alimony). Instead, the wife will be entitled to the deductions, and the husband's payments will be treated as gifts to her. Charitable donations, casualty losses, and investment losses are deductible only by the owner(s) of the property contributed or lost.

The exemption for dependents of married couples living together is allowable on a separate return only to the spouse who provides over one-half of the dependent's support for the year.

[9]Application of Section 6013(d) liability against separated and divorced women seems to be an unintended consequence of the original enactment of the general rule of joint return liability. Not one of the half-dozen cases litigated before its enactment in 1938 involved separation or divorce. The IRS seems to have developed its aggressive position in this area in the 1960s, during the post-war explosion in divorce rates. This social development could not have been foreseen in 1938.

[10]Income-splitting was not enacted as compensation for assuming joint return liability, but for the entirely different purpose of equalizing the tax burden between the common law states and the community property states, where income-splitting was already allowed on separate returns under the doctrine of *Poe v. Seaborn*, 282 U.S. 101 (1930).

[11]The "advantage" would disappear if married persons were allowed to file separately as unmarried persons: 40 percent of married couples (two-earner couples in which wives have substantial earnings) would find their taxes reduced by an average of $1,100 per couple, and 53 percent of married couples would find their taxes increased by an average of $609. Overall, the marriage "penalty" exceeds the marriage "subsidy" by about $7.4 billion. *See* Rose, "The Marriage Tax is Down But Not Out," 40 *Nat'l Tax J.* 567, 573-4.

[12]The effect seems ultimately due not to any discriminatory intent in the tax rule itself, however, but to the fact that women are in an economically inferior position in American society. Working women's earnings average only about 65 percent of men's. Fewer women than men are self-employed, and self-employed persons have much greater opportunity to conceal income and to take aggressive tax positions. Also, criminal enterprise resulting in undeclared income is probably more common among men than women. Thus, joint return deficiencies are both more likely to be caused by the husband, and are also likely to be greater in amount than deficiencies caused by the wife. Equal application of the law thus has distinctly unequal consequences.

only if they are "grossly erroneous";[13] they cause a "substantial understatement;"[14] the wife did not know, and had no reason to know of the substantial understatement caused by such items ("innocence");[15] and taking into account all the facts and circumstances, it would be inequitable to hold the wife liable for the understatement ("equity").[16] The wife has the burden of proof as to all the elements for relief.

The relief rules are unsatisfactory in two respects. First, they limit relief in many deserving cases due to the arbitrary restrictions to "grossly erroneous" items and to "substantial understatements," and second, they are vague and unpredictable due to the nature of the "innocence" and "equity" requirements. There is a large body of case law interpreting the innocence requirement,[17] but the decisions are in conflict,[18] and the outcomes are largely unpredictable.[19]

The 'innocence' test is...illogical and inappropriate as a basis for relief.

The arbitrary limitations could be adequately reformed by amending the statute to omit the dollar limitations and the requirement, in effect, of negligence or fraud on the part of the husband. But there is no way to amend the

[13]An item of omitted income is "grossly erroneous" *per se*. Erroneous claims of deduction, credit, or basis may also qualify for relief, but such items must in addition be "without foundation in fact or law." This phrase has been given conflicting interpretations by the courts, and has severely limited relief for such items. Mere disallowance of a deduction is not enough. Note that it is sometimes difficult to determine whether an item is income or deduction, such as reallocation of capital gain to ordinary income, over which there is a split of authority.

Items other than omitted income, and erroneous claims of deduction, credit, or basis are ineligible for relief, such as the alternative minimum tax, and the self-employment tax. There is no relief for simple nonpayment of tax where the return is correct; relief is in effect limited to items of negligence and fraud. There is no obvious reason for these limitations, and they have the somewhat bizarre effect of putting the wife in a better position if the husband misreports than if he reports honestly.

[14]There are dollar limitations under Sections 6013(e)(3) and (4) restricting relief to items exceeding $500, and in the case of erroneous claims of deduction, credit, or basis, the item must in addition exceed a percentage-of-income floor.

[15]Factors which have been used by the courts as indicating that the wife had "reason to know" include lavish or unusual expenditures, involvement in the family budget or the husband's business, and higher education or business experience. The courts have not applied these factors consistently.

The cases are split as to whether the wife has a duty to review the return. Some wives have been held liable for deficiencies on the ground that if they had looked at the return, they would have seen large deductions, or reported income which was less than the couple was living on. Other decisions have exonerated wives who signed without looking at the return under circumstances which seem indistinguishable. Compare, e.g., the recent tax shelter decisions in *Cohen*, 54 T.C.M. 944 (1987) and *Shapiro*, 51 T.C.M. 818 (1986)(taxpayers lost) with *Hinds*, 56 T.C.M. 104 (1988) and *Killian*, 53 T.C.M. 1438 (1987)(taxpayers won).

The wife has sometimes been held to have "reason to know" if she is aware of the existence of the underlying transaction, even if she knows nothing of its tax consequences or how the husband reported it. This doctrine that "ignorance of the law is no excuse" is without foundation in the statute. Reason to know of an understatement necessarily requires that the wife have some reason to know that the transaction has tax consequences which may have been incorrectly reported.

Where the transaction is income from illegal sources, or investment in an abusive tax shelter, mere knowledge of the transaction arguably should put the wife on notice. If the transaction is on its face licit, however, and there are no other circumstances to arouse suspicion, the "ignorance of the law is no excuse" doctrine is unjustified.

[16]The principal factor considered under the equity test is whether the wife benefited from the item over and above ordinary support. The courts have been extremely inconsistent as to what this means. Note, too, that because all elements for relief must be met, the wife may lose even if she did not benefit at all, if she is found to have had reason to know of the item.

[17]There are over 300 reported decisions under Section 6013(e), and the confusion grows ever greater. A considerable simplification would result if the relief rules could be repealed together with joint return liabililty.

[18]A particularly glaring conflict is presented by the "ignorance of the law is no excuse" doctrine, *supra* note 15. This doctrine seems to have been selectively applied only against women who are still married at the time of trial. *See* most recently, *e.g., Bokum*, 94 T.C. No. 11 (1990) (still-married wife liable for $400,000 deficiency where she knew husband's S corporation made a sale of land and a distribution to him, but neither she nor husband understood tax consequences; husband's stock basis had been incorrectly deducted from distribution on return prepared by an accountant). The Tax Court's reluctance to grant relief to still-married women may account for the origin of the erroneous rule that "ignorance of the law is no excuse" in the first place. *See McCoy*, 57 T.C. 732 (1972) (still-married wife liable for Section 357(c) gain from husband's incorporation of deficit partnership, where both husband nor wife were ignorant of tax consequences).

The *McCoy* doctrine has been glossed over in many cases allowing divorced or widowed women relief. *See*, e.g., *Estate of Vella*, 43 T.C.M. 528 (1982) (widow knew of husband's sale of property); *Hayes*, 57 T.C.M. 869 (1989) (deserted wife knew of husband's employment); *Ratana*, 662 F.2d 220 (CA-4, 1981) (deserted wife knew of husband's employment, and received extraordinary amounts of cash from narcotics trafficking); and *Guth*, 897 F.2d 441 (CA-9, 1990) (wife participated in creation of phony charitable contributions).

[19]At least as to the stated grounds of decision. It appears that many of the inconsistencies in the reported decisions can be accounted for by supposing that unconscious preferences of the judges have been at work. The Tax Court's reluctance to grant relief to women who are still married at the time of trial largely accounts for the inconsistencies in application of the *McCoy* doctrine, *supra* note 18.

Similarly, it appears that divorced women who had been housewives or who fulfilled traditional roles of dutiful dependency have fared better in the Tax Court than independent and educated women. In fact, these unconscious preferences seem to have molded some of the Tax Court's other rules as well. For example, higher education and business experience have no obvious relevance to whether the wife had reason to know of the husband's understatement, but they are routinely treated as factors unfavorable to the wife. For details, *see* Beck, "Looking for the Perfect Woman: The Innocent Spouse in the Tax Court," forthcoming in 15(1) *Rev. of Taxation of Individuals* 3 (Winter 1991).

innocence and equity tests, because they are essentially misconceived.[20]

The "innocence" test is at the heart of the relief rules.[21] But this test is illogical and inappropriate as a basis for relief. Ordinarily a reason to know (or due diligence) test is applied in the context of assessing whether a person who is in a position to prevent foreseeable harm to others has breached his duty of care. But the wife has no duty to certify the accuracy of her husband's tax items, except as created by the innocent spouse rules. Moreover, the harm to be prevented is to herself,[22] not to the government.

If she does not sign, the government is not helped in any way because the husband can simply file his own erroneous return.[23] The IRS cannot plausibly claim that it relies on the wife's signature to certify the accuracy of the husband's income, as if she were an auditor. Women generally do not know that they have any such duty of certification,[24] and do not act as if they did. In countless instances, the wife simply signs the return as an accommodation to her husband.[25] And if she refuses, she may risk her marriage.

In short, it makes no real difference at all to the government's interests whether the wife is innocent or not, nor whether she makes any effort at due diligence when she is "put on notice." For that reason, there is no underlying purpose or principle to guide the courts in weighing the variety of factors used to determine degrees of "innocence."

Under these circumstances, it is not surprising that the various legal "tests" have in large part degenerated into a global subjective one of whether the woman and her plight can move the judge to sympathy. It is obvious that taxation should not depend on such subjective criteria, and for that reason the innocent spouse rules cannot provide the remedy for the unjust effects of joint return liability.

B. Repeal of Section 6013(d)

In order to institute a regime of proportional separate liability for married persons, no other changes will be required. The current rate structure and system of filing statuses can remain unchanged, and the benefits of income-splitting for joint filers can be preserved. The separate liability of each spouse will be calculated according to the "separate tax formula" cited above. First, each spouse's tax is calculated as if he or she filed separately, and then the ratio of wife's separate tax to the sum of both separate taxes is applied to the total joint tax due. In this way the benefit of of the income-splitting rate structure is preserved, but the wife is liable only for the portion of the joint tax which is due to her separate income.[26] The formula is thus:

sep. liability = (sep. tax / both sep. taxes) x joint tax

Calculation of the wife's separate tax liability in the first instance will not require any changes in current law.[27]

III. NO ABUSE POTENTIAL

There would appear to be no abuse potential in repeal of joint return liability. Whatever abuse potential might arise from repeal of joint return liability appears to exist

[20]The reason for most of the defects in Section 6013(e) is that the rules were narrowly drafted to track the ad hoc reasoning used by the Sixth Circuit to nullify joint and several liability in a spectacularly unfair case. In *Scudder v. Comm'r*, 405 F.2d 222 (1968), *rev'g* 48 T.C. 36 (1967), the husband had embezzled large sums from a business owned by the wife and her sisters, without their knowledge. The IRS pursued her for taxes (including the 50-percent fraud penalty) on the embezzlements, and won in the Tax Court. The Sixth Circuit simply refused to apply the law, and exonerated the wife on the ground that she could not have intended to file jointly as to these fraudulent items, where she did not know of them, and did not benefit from them.

The Sixth Circuit's ingenious approach allowed it to do justice in the case at bar at a time when no statutory relief at all was available. But the relief was crafted to fit unusual facts, and it was inappropriate for Congress to use this narrow ad hoc device as the basis for general statutory reform.

[21]The importance of the innocence test is perhaps due to an intuitive perception that joint return liability is itself simply unfair. To the extent that the liability can be rationalized as somehow due to the wife's own fault, liability can be imposed in a manner less troubling to the conscience.

[22]The harm is that she will be liable for her husband's taxes. Note that she has no motivation to act upon her "duty" unless she is aware of joint return liability in the first place.

Many cases make it painfully clear that the wife (and her tax advisers) had no idea of the liability. Professionally advised women have sometimes signed several years' late returns at once in situations where it appeared doubtful that the husband could pay the delinquent taxes. Joint returns are often signed as part of property settlement agreements after separation. Divorce lawyers sometimes insist upon an agreement holding the husband liable for any deficiencies, but such agreements do not bind the IRS, as many unlucky women have learned, and in fact such agreements give her little more protection than her common law right to contribution already provides.

[23]Of course, neither the statute nor the courts require the wife to dissuade her husband from filing a false return, let alone to denounce him to the IRS. The law does not ask her to prevent the harm, it only asks her not to sign the return. If she files separately, the wife is not liable for the husband's taxes even if she has actual knowledge of his cheating.

[24]It appears that very few taxpayers are, or have any reason to be aware of this assumption of liability. There is no warning on the Form 1040. Nor does it appear that preparers or divorce lawyers generally take this liability into account.

Note also that even if a wife is aware of this "duty," the penalty for breaching it is unfair. If a professional return preparer or an IRS agent fails to use due diligence, he does not become liable for the tax deficiency he could reasonably have been expected to discover on someone else's return. And yet such persons have both tax expertise and awareness of their professional duties, upon which the IRS does reasonably rely.

[25]When the duty of due diligence is pushed as far as it was in *Bokum*, *supra* note 18, it in effect requires the wife to seek a second professional opinion in all cases.

Such a requirement is not only unrealistic and unreasonable, it also defeats the original purpose of joint filing, which was to provide convenience to both the taxpayer and the government. It is unreasonable to expect both spouses to duplicate the effort of preparing the return, particularly if only one has income, or any complexity to his tax affairs.

[26]This calculation will not increase the complexity or difficulty of preparing returns, because it will only be employed on audit in cases where there is a deficiency which is contested by the wife.

[27]As explained *supra* at note 8, current law for apportioning personal deductions and dependent exemptions on returns of married persons filing separately seems generally adequate. The current rules could be improved in some respects, however. Allocation using a percentage based upon each spouse's adjusted gross income, as under some state income tax systems, might be both simpler and fairer than the current federal rules. Such a rule would obviate the need for any tracing of funds. The problem seems minor, however, and no immediate need for correction is foreseen.

already under current law. A couple planning to avoid the husband's taxes while leaving the wife with property not subject to tax can simply file separately. If there were any abuse potential here, it would already be exploited.

If joint return liability is repealed, the IRS may be expected to rely upon transferee liability under Section 6901 as a substitute. Although transferee liability will not apply in many cases where Section 6013(d) currently does apply, transferee liability should be adequate to police any potential abuses.

Establishment of transferee liability for taxes depends upon state law of fraudulent conveyance, or federal bankruptcy law, where applicable.[28] This will usually require the IRS to prove that the husband was insolvent at the time of a transfer of property to the wife, or that he became insolvent as a result of the transfer, and that the property was transferred without adequate or fair consideration. Where there is inadequate consideration for the transfer, it is presumptively fraud and there is no need to prove fraudulent intent on the part of either the debtor or the transferee.[29] Transferee liability can, therefore, apply under current law even if the wife is an innocent spouse within the meaning of IRC 6013(e).[30] Even if adequate consideration supports the transfer, however, if the wife is aware of or participates in her husband's fraud on his creditors, the transfer may still be set aside as fraudulent.[31]

A. Transferee Liability and Divorce

Transferee liability may apply even after a couple has divided its property pursuant to a separation or divorce agreement. The usual question is whether the wife's marital rights surrendered pursuant to an agreement constitutes adequate consideration within the meaning of state fraudulent conveyance (or federal bankruptcy) law. Here one must distinguish between the wife's rights to support or alimony, children's rights to support, and the wife's ownership rights to marital property.

B. Alimony

Where property is transferred to the wife in lieu of alimony and in exchange for a waiver of her rights to support, the transfer has often been held to be for adequate consideration, thus putting the property beyond the reach of creditors, including the IRS. On the other hand, the matrimonial dispute or separation must be genuine, and the wife's right to alimony must be enforceable and reasonable in amount.[32] If the wife would not have been entitled to alimony under state law, her waiver of such rights is worthless and does not constitute fair consideration.[33]

It has been held that where the wife is without knowledge of the insolvent husband's tax debts, she is an innocent purchaser of his property. . . .

Even where the wife's rights to alimony are real and valuable, a transfer may still be set aside if the circumstances indicate that the wife was aware of, or participated in her husband's fraud on creditors.[34] Failure to mention the husband's debts to the divorce court when the wife is aware of them constitutes such fraud where the decree leaves the husband without means to satisfy his creditors.[35] It has been held that where the wife is without knowledge of the insolvent husband's tax debts, she is an innocent purchaser of his property in exchange for a waiver of her valuable rights to support pursuant to an antenuptial agreement, and the transfer may not be set aside.[36]

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[28]These sources of law are generally similar, but there are some differences in the statutory language. Thus the results may sometimes vary depending on which state law (or whether federal bankruptcy law) applies.

[29]*See, e.g., Mysse v. Comm'r*, 57 T.C. 680 (1972) (transfer of $10,000 C.D. to wife without consideration set aside where embezzler husband was insolvent at time of transfer because unassessed tax liability of over $115,000 from unreported income exceeded his total assets of $46,429. (Montana law)).

[30]In *Mysse, supra* note 29, the wife was held to be an innocent spouse with respect to IRC 6013(e) because she had no actual or constructive knowledge of the embezzlements, and received no significant benefit beyond ordinary support. She was nevertheless liable as a transferee for her husband's taxes to the extent of the transfer.

[31]*See, e.g., Wilkey v. Wax*, 225 N.E. 2d 813 (App.Ct.Ill. 1967) and *U.S. v. Alaska*, 661 F. Supp. 727 (N.D.Ill. 1987), both discussed *infra.*

[32]*Marine Midland Bank v. Batson*, 70 Misc. 2d 8, 332 N.Y.S. 2d 714 (1972) (wife's right to alimony and to widow's right of inheritance election held to be "fair consideration" under N.Y. Debtor and Creditor law, but debtor's and wife's motion for summary judgment denied because genuine issues of fact required trial as to bona fides of marital dispute and separation on eve of litigation, and as to actual value of wife's rights surrendered in exchange for husband's property).

[33]*Brown v. Borland*, 230 Neb. 391, 432 N.W. 2d 13 (S.Ct. Neb. 1988) (insolvent husband's transfer of his interest in jointly owned residence in exchange for wife's right to alimony pursuant to separation agreement set aside where alimony would not have been awarded by a court due to husband's poor work history and his prison sentence, and where wife was self-supporting, even though wife had made most of the payments on the residence, which were gifts to husband and did not constitute "fair consideration").

[34]*Wilkey v. Wax, supra* note 31 (transfer of all debtor husband's assets to wife in lieu of alimony pursuant to divorce decree set aside where wife was aware that husband was under threat of imminent litigation for damages by widow of man whom husband had murdered; "fraud in fact" may be presumed from circumstances even where consideration is present).

[35]*U.S. v. Alaska, supra* note 31 (insolvent husband who was defendant in suit to recover several million dollars obtained through Medicare fraud transferred all his assets constituting a $200,000 insurance claim to wife in exchange for her rights to alimony pursuant to divorce decree; transfer set aside as fraudulent where husband did not defend the divorce action, and neither husband nor wife informed divorce court of welfare fraud litigation, of which wife was aware).

[36]*Miele v. U.S.*, 87-2 U.S.T.C. para. 9434 (So. D. Fla., 85-6365-CIV-EPS, 6/23/86) (antenuptial agreement upheld where entered into at time when husband faced prison sentence on state charges but before tax assessments made and wife was without knowledge of husband's nonfiling of tax returns; over government's objection that due to insolvency husband had no separate property out of which to make antenuptial settlement or to pay support, court held that consideration was valid because husband might someday emerge from debt and prison to become financially sound again. Fla. Uniform Fraudulent Conveyance Act requires actual fraud on wife's part before transfer for fair consideration may be set aside).

C. Child Support

Whether a waiver of rights to child support in exchange for an insolvent husband's transfer of property constitutes fair consideration sufficient to overcome transferee liability is more problematic. The law appears not to be well settled. It has been held that although a wife may waive support rights, a minor child may not, and because the husband will remain liable for child support no matter what provision is made by transfer of property into a trust or otherwise for the benefit of children, a waiver of rights to child support does not constitute consideration. A transfer of property by the boxer Joe Louis in trust for his children at a time when he was insolvent, but made without fraudulent intent, was set aside to pay income taxes.[37]

The wife's claim to her share of marital property is adequate consideration to the extent of her prior ownership.

It seems proper to recognize some difference between child support and alimony for these purposes, because in most jurisdictions child support, unlike alimony, could probably still be awarded on the ground of a later change of circumstances, even after rights to both were surrendered in exchange for lump-sum transfers.

D. Property Division

The wife's claim to her share of marital property is adequate consideration to the extent of her prior ownership. It has been held that a division of community property is not a fraudulent conveyance, because the property transferred was already owned by the wife.[38] To the extent property is jointly owned in common law jurisdictions, the same reasoning would hold, unless the joint ownership itself is the result of a fraudulent transfer. The conveyance of an insolvent husband's interest in a jointly owned residence to the wife pursuant to a separation agreement has been set aside as fraudulent where she gave up no valuable rights, but received nearly all the marital property.[39]

On the other hand, such a conveyance was held valid against creditors where it was supported by consideration in the form of cancellation of antecedent debts of the husband to the wife from earlier cash advances, together with a fresh cash advance to bail him out of jail and obtain a lawyer.[40]

Applying the above principles to a division of marital property which is in the separate name of one spouse who is insolvent due to unassessed tax liabilities, a division of property under an equitable distribution or similar statute would clearly constitute a fraudulent transfer if the court or the parties did not take into account tax liabilities of which the wife is aware. Even if she is not aware of the tax liability, however, such a division of marital property would probably be voidable for lack of adequate consideration, because it seems doubtful that her property rights rise to the level of ownership.[41]

E. Transferee and Joint Liability Compared

Transferee liability cannot apply unless the husband is insolvent and unable to pay at the time of attempted collection, as well as at the time of the transfer. If the IRS

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[37]*First Nat' Bank of Chicago v. Comm'r*, 255 F.2d 759 (1958). On the other hand, it has been held that transfers of real property by an insolvent husband pursuant to divorce "in lieu of alimony" into two trusts for the benefit of minor children, with life estates reserved respectively to the husband and wife, were supported by adequate consideration except for the life estate reserved to the husband. *Milstead v. Pennington*, 268 F.2d 384 (5th Cir. 1959) (Alabama law). It has also been held that a transfer in consideration of the wife's agreement not to pursue child support (and alimony) did not constitute fair consideration where the wife was self-sufficient and the husband without means, because a court would probably not award child support (or alimony) under such circumstances. (The decision was also based upon a finding that such rights of either kind would relate only to future support, and thus neither would constitute an "antecedent debt"as required under Nebraska's Uniform Fraudulent Conveyance Act.) *Brown v. Borland*, *supra* note 33. That decision seems to imply that an exchange of valuable antecedent rights to child support might constitute consideration for a transfer of property if a court of competent jurisdiction approved.

[38]*See Santos v. Comm'r*, 246 F 2d 204 (9th Cir. 1957) (division of community property not a transfer for purpose of transferee liability, because she already owned half under state law).

[39]*See Brown v. Borland*, *supra* note 33. *See also In re Lange*, 35 B.R. 579 (Bkrtcy. 1983) construing Bankruptcy Code, 11 U.S.C. 548(a)(2) and 550(a)(trustee successfully avoided insolvent debtor's transfer of his interest in a jointly owned residence to his wife pursuant to divorce within one year of his bankruptcy petition where the residence consisted of nearly all the couple's marital property, because the spouses were on an approximately equal economic footing, and she gave nothing in return for receiving almost all the marital estate).

[40]*Barbee v. Pigott*, 507 So. 2d 77 (S.Ct. Miss. 1987).

[41]Although the wife's rights to marital property have been held to be consideration-equal in value to the husband's property transferred to her in *U.S. v. Davis*, 370 U.S. 65 (1962)(husband's transfer of appreciated stock to wife in divorce a taxable sale in exchange for her marital rights), it would appear that to the extent the value of the marital estate is reduced by an inchoate tax lien, the wife's property rights to the marital estate are also diminished, and the consideration for the transfer would be *pro tanto* inadequate. If the consideration is inadequate, inquiry into the wife's intent is unnecessary, and transferee liability would apply even where she knows nothing of the husband's tax liability.

Consider the following illustration. Suppose the husband has total assets with title in his name of $300x, all of which is marital property subject to division. The wife has $100x of her own separate property. They divide the marital property by agreement in the ratio 2-1, $200x to the husband, and $100x to the wife, so that afterwards each spouse has $200x of net assets. Subsequently, a tax deficiency is assessed against the husband for $300x which was an inchoate lien against the marital property in his name. The husband thus became insolvent as a result of the transfer to the extent of $100x. In retrospect, the marital estate was worth nothing net of the tax lien, and therefore the wife's marital property rights were worth nothing also. All $100x of the transfer would thus be without consideration, and subject to payment of the husband's taxes. If the tax assessment were for $200x instead, so that the marital estate was worth $100x dollars net of the tax liability, the husband would not become insolvent as a result of the transfer because he would be left with $200x after the division of property, and transferee liability would not apply. The husband would pay the entire tax liability, unless there was provision in the separation agreement to share contingent liabilities, in which case he would seek reimbursement from the wife.

is restricted to exclusive reliance on transferee liability because joint return liability is unavailable, that will automatically have the desirable effect of forcing the IRS to exhaust all remedies against the husband before proceeding against the wife. In addition, transferee liability is limited to the amount of the transfer, and therefore (unlike liability under Section 6013(d)) the wife's liability cannot exceed the amount by which she was benefited.

As noted above, an "innocence" test is also sometimes required under transferee liability in cases where there was consideration for the transfer, in order to determine whether the wife is an innocent purchaser for value. But here again the test is much more fair and rational than under joint return liability. The wife would be liable as a transferee only if she had intent to defraud creditors, and the burden of proof would be on the IRS to show that she had actual knowledge of the husband's tax (or other) debts and of his insolvency at the time of the transfer.

Finally, under transferee liability the wife is not at any unfair disadvantage compared with other transferees. All transferees are treated alike under Section 6901, without regard to marital status. By contrast, 6013(d) applies only to spouses. Children, parents, and even an adulterous girlfriend may receive gifts out of the husband's untaxed income, even with knowledge of his tax cheating, without liability (provided that the husband is solvent). Wives alone incur a liability in this situation.

Transferee liability will not be a complete substitute for joint return liability in all circumstances.

Transferee liability will not be a complete substitute for joint return liability in all circumstances. If joint return liability is repealed, some situations will inevitably arise where the IRS will not be able to recover property of the wife which is in part derived from untaxed income of the husband. Perhaps, the most likely situation is where property was transferred into joint ownership during marriage, or transferred outright in divorce, at a time when the husband was solvent, but the husband later becomes insolvent due to other transactions. The IRS may also have difficulties proving that the husband was insolvent at the time of transfers which were made to the wife long before the husband's tax delinquency is discovered. In such cases the wife will have profited, although perhaps innocently, at the expense of the IRS. It seems unlikely, however, that such situations will arise frequently or will present a problem serious enough to require a remedy in anticipation, and none is suggested here.

It is well to remember that every other developed country manages to collect its taxes without reliance on joint and several liability.

IV. COMMUNITY PROPERTY

A wife who resides in a community property jurisdiction is subjected to liability for one-half of her husband's taxes under the doctrine of *Poe v. Seaborn*, 282 U.S. 101 (1930), which construed family property law in the community property states (California, Nevada, Washington, Idaho, Arizona, New Mexico, Texas, Louisiana, and since 1986, Wisconsin) to create a separate liability of each spouse for one-half of the tax on the income of the other on the theory that all earnings during marriage inure to the marital community, and are therefore owned by and taxable to each spouse in equal amounts. This form of liability does not depend upon filing a joint return, and results automatically from residence in a community property jurisdiction.

The *Seaborn* decision was very questionable when decided, and it was widely criticized. Under community property law generally the wife has no right to spend or otherwise dispose of any part of her husband's earnings.[42] Her "ownership" rights to such income arise only upon dissolution of the martial community by divorce or death, and then only to such income that the husband has not already spent.

The *Seaborn* decision arose in the context of rates rather than liability, because the wife was willing and eager to accept liability to reduce her husband's taxes through income-splitting. The question was whether the wife had the right to report half of husband's income on her separate return, rather than whether she had the duty to do so. It was not long before the IRS seized upon the decision to construct such a duty, however, and the result was a number of very harsh decisions requiring divorced women to pay half of their ex-husbands' taxes in situations where they had received no benefit from his earnings.[43] A woman cannot protect herself from this form of liability even by filing separately, unless she first dissolves the community of property.[44]

Apparently, no other income tax system in the world today except the U.S. imputes earned income from one spouse to the other on the ground of community property law,[45] including Spain, France, and Mexico, from which our state community property laws derive.[46] In Canada, a situation arose which was identical to that in *Seaborn*, and the Canadian Supreme Court reached the opposite

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[42]This is still true even under the modern dual-management community property regimes. *See* Smith, "The Partnership Theory of Marriage: A Borrowed Solution Fails," 68 *Texas L.Rev.* 689 (1990).

[43]*See U.S. v. Mitchell*, 91 S.Ct. 1763 (1971) (wife liable out of her separate property for one-half of the taxes due on her husband's earnings which were community property under Louisiana law, although she had renounced her share of the community property at divorce and was thereby also freed of community debts; local law limiting private creditors' rights ineffective against federal tax lien). The Supreme Court noted the harshness of the result, but said the law was clear and the only remedy was legislative action similar to the newly enacted Section 6013(e). Enactment of Section 66 was nine years in coming, and probably would not have protected the wife in *Mitchell* in any event.

No mention was made in the *Seaborn* briefs of the possibility that the government might someday use the rule as a sword against non-earning wives. The anti-taxpayer use of the rule seems wholly unintended.

[44]*See, e.g., Schoenhair v. Comm'r*, 45 B.T.A. 576 (1941) (valid oral agreement under Arizona law between spouses that husband's income from practice of law would be his separate property prevented taxation of one-half of such earnings to wife).

[45]Countries which ignore their community property law for purposes of taxing earned income include Canada, Germany, Belgium, the Netherlands, Sweden, and Italy, as well as France, Spain, and Mexico.

[46]For the history of state community property law *see* generally Murray, "Problems of Taxation of the Income of Spouses in the Context of Divorce and Separation," 14 *Community Property J.* 20 (1987).

conclusion interpreting Quebec community property law. Because the husband had the absolute right to dispose of his earned income as he pleased, he must be taxed on it despite the wife's contingent rights under the community property regime.[47]

Still more surprising is the fact that at least two community property states, Arizona and California, reserve the right for state income tax purposes to tax either the earner for the full amount, or the community property owner for one-half. Thus the federal tax system defers to state matrimonial property law where the state's own tax law does not.[48]

Nearly all petitioners for relief under section 66 have lost.

A. Relief Under Section 66

There are relief provisions under IRC 66, first enacted in 1980, for the innocent spouse which provide limited relief from community property liability analogous in many respects to relief under IRC 6013(e).[49] The rules are far too restrictive, and have often failed to prevent obviously unfair results.[50] It appears that nearly all petitioners for relief under Section 66 have lost.[51]

Section 66(c) (enacted in 1984) contains the same requirements of "innocence"[52] and "equity" which are criticized above in connection with Section 6013(e). Two other provisions allow relief without proof of innocence, but they suffer other shortcomings. None of the Section 66 provisions provides any relief for items other than omissions of income. Section 66(a) provides relief only if the couple lived apart at all times during the calendar year, and none of the earned income in question was transferred between them. Even one day of cohabitation during the year, or payments of support which are not *de minimis*, will preclude relief.

Section 66(b)(enacted in 1984) provides that the benefits of community property law may be disallowed to any taxpayer if he acts as if solely entitled to the community income, and fails to notify his spouse of the nature and amount of such income before the due date for the taxable year. The "benefit" here is the husband's relief of liability for one half of his earnings. This provision may be defeated if the husband notifies the wife of her liability, even if he gives her nothing.

B. Repeal of Seaborn

There is no doubt that Congress has the authority to overrule *Seaborn*, and it has already done so in many limited contexts.[53] The *Seaborn* rule has never been applied at all for purposes of the payroll taxes (Social Security and hospital insurance) and for the tax on self-employment income.

In 1976, Congress in effect repealed the *Seaborn* rule for couples, one or both of whom are nonresident aliens. It is this rule, codified under Section 879(a), which is recommended here for extension to all taxpayers. Under Section 879(a), the earned income of such couples is taxable to the earner alone. Trade or business and partnership distributive share income is treated as provided by Section 1402(a)(5), under which trade or business income is taxable entirely to the husband, unless the wife exercises substantially all the management and control, in which case the income is taxable to her.[54] Partnership distributive share income is taxable entirely to the spouse who is the partner. Income from separate property is the separate income of that spouse, notwithstanding the law of some states which treats such income as community property. Other community income (which appears to be limited to unearned investment income) is subject to the *Seaborn* rule. But for such income, it seems proper to tax each spouse for one-half, because the community ownership rights to such income do not differ significantly from the rights to income from jointly owned property in the common law jurisdictions, where the same rule applies.

The rules under Section 879(a) should be extended to apply to the community income of all couples. It is recommended that current Section 66 be repealed and

[47]*See F.Sura v. M.N.R.*, 62 D.T.C. 1005 (1957) (Quebec taxpayer not permitted to split his income with his wife through community property law; *Seaborn* rule rejected).

[48]If it had been thought necessary to respect the matrimonial property law of the community property states for purposes of taxing earned income, the result should probably have been as it was generally in Europe in the early part of the century: mandatory joint returns with the husband primarily responsible for payment as sole administrator of the community property. *See* generally Dulude, "Taxation of the Spouses: A Comparison of Canadian, American, British, French, and Swedish Law, 23 *Osgood Hall L.J.* 67, (1985). This would have been a far more realistic interpretation of community property law than the *Seaborn* decision, which imputed half of the husband's earned income to the wife. Also, it would not have created the intolerable disparities in the level of tax burden between the states which arose in consequence.

[49]Before enactment of the relief provisions, at least one court refused to apply the rule of *Seaborn* to avoid the "horrendous" result that the wife was "stripped clean" by the IRS though she had received none of his income. In *Bagur v. U.S.*, 603 F. 2d. 491 (1979), Judge Wisdom remanded the consolidated appeals to the Tax Court to determine whether the wives had suffered the equivalent of theft losses of their share of the community income.

[50]*See* most recently Minnick, "The Innocent Spouse Doctrine: The Need for Reform and Planning Alternatives in the State of Texas," 66 *Taxes* 56 (1988).

[51]It is revealing to note that when Section 66 was enacted, its revenue cost was estimated to be "negligible."

[52]The innocence test is nearly impossible to meet under Section 66, because if the wife knows her husband was employed, she loses.

[53]Many sections of the code contain provisions which are to be applied "without regard to community property laws." Among these are Section 32(c)(2)(B)(i) [earned income credit]; Section 402(e)(4)(G) [lump-sum benefits]; Section 408(g) [individual retirement accounts]; Section 414(d)(4)(A) [limitation on cash method of accounting]; Section 457(d)(7) [deferred compensation plans of state and local governments]; Section 911(b)(2)(C) [foreign earned income]; Section 4980(d)(4)(A) [excess distributions from qualified plans], and, of course, Section 6013(e)(5) [innocent spouse rule] and Section 66 itself.

[54]It is recommended that the language be amended to be gender-neutral, so that such income is taxable "to the spouse who has substantially all the management and control of the trade or business."

replaced with a cross-reference to Section 879(a), and that current Section 879(a) be expanded to cover all taxpayers.

The rule of Poe v. Seaborn now provides no benefit to taxpayers, and is advantageous only to the government.

The rule of *Poe v. Seaborn* now provides no benefit to taxpayers, and is advantageous only to the government.[55] This is ironic in view of the fact that the *Seaborn* doctrine arose as a device to benefit residents of community property jurisdictions. This benefit was jealously guarded by representatives of such jurisdictions when repeal was attempted in 1940 (by means of proposed mandatory joint returns, without joint and several liability) in order to equalize the tax burden among the states. But since the 1948 introduction of income-splitting on joint returns for all married persons, the *Seaborn* rule no longer provides any advantage to taxpayers, and there should be no opposition to its repeal from the community property states.[56]

If Congress does not act, the states could apparently rid themselves of the *Seaborn* rule by simply enacting a few words into the appropriate family property statutes, without actually changing substantive community property law in any respect.[56A]

V. EFFECT ON THE TAX SYSTEM

Neither repeal of Section 6013(d) nor repeal of the *Seaborn* rule need have any effect upon current tax rates nor filing statuses, and none is recommended here. These proposals for strictly proportional tax liability between spouses are put forward on their own merits for the sake of fairness and simplicity,[57] and not as a first step toward reform of the rate system generally.[58]

It should be noted, however, that if the problem of the "marriage penalty" is ever to be fully resolved, repeal of the *Seaborn* rule is a necessary precondition. Without it, allowing married taxpayers to file separately using the tax rates for single persons would once again give an advantage to residents of community property states, and recreate the unjustifiable geographic disparities in

[55]Except for a husband who may escape tax on half of his income, whether or not the wife has paid taxes on the other half, See *Cavanagh*, 42 B.T.A. 1037 (1990). Note that this is a complete escape, since the wife has no right to contribution from him if she does pay half of his taxes, as she does in the case of joint return liability.

[56]Repeal of *Seaborn* would of course have no effect on community property law itself, and no recommendation is made here as to any issue of state family property law.

Note that even after repeal of *Seaborn*, women subject to community property law will remain under a tax disadvantage, because the husband's community half interest in the wife's earnings is a property interest within the meaning of Section 6321 and subject to levy even for his antenuptial tax debts. Thus one-half of the wife's earnings may be levied upon to pay all the husband's taxes even where she has no personal liability for them under *Seaborn. See, e.g., Medaris v. U.S.*, 884 F.2d 832 (CA-5, 1989) (IRS may levy upon all husband's earnings, and one-half of wife's earnings, to pay husband's antenuptial tax debts; reversing court below as to levy on only one-half of husband's earnings, on the ground that all husband's earnings were subject to antenuptial debts to private creditors under Texas law, and government should not be in worse position).

Apparently, nothing prevents the IRS from advancing both the theories of *Seaborn* and *Medaris* simultaneously in order to levy upon *all* the wife's earnings to pay *all* the husband's taxes. If the husband's tax liability in *Medaris* had been incurred during marriage, so that *Seaborn* applied, presumably the other half of the wife's earnings could have been levied upon also, to satisfy her personal liability for one-half of the husband's taxes under *Seaborn*. The result would be identical to joint return liability, at least where the couple is still married. Levy under *Medaris* is only possible where the community is intact. This provides an undesirable incentive for the wife to dissolve the community so that the husband will have no further interest in her earnings.

[56A]The magic words are "presented, vested interest." In 1921, Attorney General Palmer ruled that taxpayers in all the community property states except California could split their incomes using the rule later approved in *Seaborn*. 32 Op. Att'y Gen. 435 (1921). California was excluded because its courts had described the wife's community property interest (in a different context) as a mere "expectancy", rather than as a "vested interest." The relevant rights of the spouses under California law were indistinguishable from those in the other community property states, however. They were merely characterized differently. In 1927, the California legislature amended the civil code to insert a provision that the spouses had "present, existing, and equal interests" on community property. The provision did not in any way change the rights or powers of the spouses under California law, and was to secure for California taxpayers the same right of income-splitting for federal tax purposes as had been allowed for the other community property states. The maneuver was successful. In *U.S. v. Malcolm*, 282 U.S. 792 (1931), California was brought under the *Seaborn* rule, and the Supreme Court specifically mentioned the California amendment as the ground of decision. See generally Bruton, "The Taxation of Family Income", 41 *Yale L.J.* 1172, 1173-77 (1932).

It seems to follow that California, and any other community property state, could free itself of the *Seaborn* rule by a simple amendment to the state statutes which asserts that the spouses' interests in each other's income is an "expectancy" and not a "present, vested interest." This would not alter substantive property law in any respect (in part at least because such interests are in fact mere expectancies).

[57]As noted above, repeal of Section 6013(d) would end the vexing litigation under the Section 6013(e) relief rules. Repeal of *Seaborn* would similarly permit repeal of Section 66, and it would also remove the need for much tax litigation over taxpayers' domicile and marital status, which is currently necessary to determine whether income is community property subject to the *Seaborn* rule.

[58]This is not meant to be an endorsement of the system of rates and filing statuses currently in effect, however. Reform is badly needed. A single filing status and single tax rate which is applicable to all individuals and which is marriage-neutral is obviously preferable to the hypercomplex jumble of dubious preferences and penalties under the current system of filing statuses. *See* Robinson and Wenig, "Marry in Haste and Repent at Tax Time: Marital Status as a Tax Detriment," 8 *Va. Tax Rev.* 773 (1989), and most recently Harmelink, "Marital Status Tax Discrimination After Tax Reform: Proposals to Resolve the Penalty/Bonus Issues," 26(3) *Willamette L. Rev.* 593 (1990).

tax rates which the 1948 compromise was designed to end.[59]

A. Revenue Cost

The IRS keeps no statistics on the frequency or amounts of collection from the nonearning spouse. It is therefore difficult to estimate the revenue loss from repeal of 6013(d) or *Seaborn.* It is possible that the loss may not be very large, because often the husband is available to pay, and the wife is taxed only because her assets are more easily accessible to levy. In such cases, there may be an added cost of collection, but no revenue loss. In other cases, transferee liability would apply. In some instances, the Treasury will even profit from repeal.[60] Some overall revenue loss is probably inevitable, however.[61] But it must be borne because the government's revenue needs cannot justify taxing the wrong taxpayer in amounts bearing no relation to ability to pay.

VI. CONCLUSION

Married persons should be taxed only on their own individual incomes (according to the rules under Section 879(a)), without liability for the income of their spouses, even when they file joint returns or when they are residents of a community property state. Sections 6013(d) and (e) should be repealed, and Section 66 should be amended to extend the rules of Section 879(a) to all taxpayers.

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[59]*Seaborn* is in fact directly responsible for the present complicated system of four different filing statuses and the inequitable results in the rates (*see supra* note 11). Congress should have repealed *Seaborn* in 1948 (or long before) rather than adopting the compromise of income-splitting on joint returns instead. This only led to more unsatisfactory compromises, and to the marriage penalty.

Equitable reform is by no means impossible. The well-known "proof" that the marriage penalty problem is insoluble because it results from a collision of incompatible principles (progessive rates, marriage neutrality, and equal taxes for equal-income families) is not compelling. The principles involved are of a different order. The third "principle" was never recognized or accepted until the *geographical* inequities created by *Seaborn* made it an issue. Before *Seaborn* (and even afterwards, in the common-law states), no one saw any inequity in the fact that a husband and wife who each actually earned income might pay less taxes filing separately than a sole-earner husband alone would pay with the same family income. It is difficult to see any inequity in that, taken by itself (and it is not controversial in Canada or Japan, for example, where it has always been the law). A genuine inequity arose only when identically situated sole-earner husbands with equal incomes paid different taxes solely because they lived in different states. Combatting the *Seaborn* inequity did not require violation of the principle of marriage-neutrality and the creation of a pseudo-principle that equal-families-pay-equal-taxes; it only required repeal of *Seaborn.*

The difficulties which continue to dog the *Seaborn* decision even today are further evidence that *Seaborn* was incorrectly decided. Bad law breeds more bad law. The solution to the marriage penalty, and to Section 66, is not still more bad law, but repeal of *Seaborn.*

[60]For example, under current law a wife may actually escape tax on her own earnings by achieving innocent spouse status under Section 6013(e). This seems to have occurred in *Price v. U.S.*, 887 F.2d 959 (CA-9, 1989), *rev'g* an unpublished Tax Court decision, although the issue is not discussed in the opinion. There the husband's $90,000 tax-shelter deduction offset the wife's $23,000 of earnings as well as the earnings of her husband, and when the wife was held to be an innocent spouse, she was apparently relieved of her own tax liability as well as that of her husband. This absurd result seems to follow logically from the statute: there is apparently no authority for a judge to grant innocent spouse status only with respect to the husband's earning in such a situation. Under current law a judge must apparently choose between two wrong outcomes: taxing the wife on both incomes, or on neither.

Under the *Seaborn* rule the Treasury may also lose revenue, because the husband cannot be taxed on one-half of his income, and the wife may not be available to pay taxes on the other half. See *supra* note 55. Such losses can only occur where the earnings are not subject to withholding, however, because the credit for withheld taxes is allocated one-half to each spouse's liability. Treas. Regs. 1.31-1(a).

[61]The actual revenue loss cannot be estimated accurately by simply writing off all potential assessments under section 6013(d) and *Seaborn*, however, because many such assessments are unrealistic or illusory from the point of view of actual collection. The IRS often assesses huge deficiencies on insolvent taxpayers (typically, but not limited to narcotics dealers and embezzlers) where it is obvious that the deficiency cannot be collected from either spouse. *See, e.g., Ratana v. U.S.*, 662 F.2d 220 (CA-4, 1981), where the IRS assessed a deficiency of $778,067 against a wife of very modest means whose husband fled the country to avoid prison for tax evasion from his narcotics trafficking.